

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Request for Review of Decisions of the Universal Service Administrator by)	WC Docket No. 02-6
)	
J. Sterling Morton High School District 201)	
)	

To: Chief, Wireline Competition Bureau

PETITION FOR RECONSIDERATION

INTRODUCTION

Petitioner J. Sterling Morton High School District 201 (“Morton”) respectfully requests that the Wireline Competition Bureau (“Bureau”) reconsider its decision¹ to deny Morton’s requests for review of decisions of the Universal Service Administrator.

Morton prays that for the reasons stated in this Petition for Reconsideration the Bureau will grant the invoice deadline extensions sought.

BACKGROUND

Morton is a school district in Cicero, Illinois, which prides itself on its student-centered instruction philosophy, based on a curriculum designed to prepare over 8,000 students for higher education and to become productive, contributing members of society.

On 8/23/2012 Morton submitted invoice deadline extension requests to Universal Service Administrative Company (“USAC”) for certain funding requests. On 10/11/2012 USAC issued denials of those requests.

Bureau precedent and policy in effect on the date of Morton’s invoice deadline extension request were to grant appeals of such requests denied by the Fund

¹ *Hancock et al. Order*, DA 15-570 released 5/11/2015

Administrator², regardless of how much time had passed between the invoice deadline and the request for a deadline extension³.

On 12/10/2012 Morton submitted to the Federal Communications Commission (“Commission”) a request for review of the Universal Service Administrator’s decisions.

The Commission’s Rules⁴ provide that the Bureau shall, within 90 days, take action in response to a request for review of an Administrator decision that is properly before it. However, as of 3/11/2013 the Bureau had not yet issued a decision on Morton’s appeal.

The Rules provide that the Bureau may extend the time period for taking action on a request for review of an Administrator decision for a period of up to 90 days, and over the years the Bureau⁵ has in fact granted itself extra time – nearly always 30 or 60 days – to issue a decision when the Bureau deemed extra time was necessary⁶. However, in the case of Morton’s appeal the Bureau did not elect to extend the time period for it to take action.

² E.g., see *Canon-McMillan School District Order*, 23 FCC Rcd 15555 (2008), where the Bureau found that in cases where a staff change or inadvertent error by staff resulted in the late filing of the FCC Form 472, and where the applicants demonstrated that they made a good faith effort to comply with E-Rate program rules, invoice deadline extensions should not be denied.

³ E.g., see *Alton Community Unit Order*, 25 FCC Rcd 7089 (2010), where the Bureau granted appeals seeking invoice deadline extensions for FY1998 funding requests; and *Clintonville Public School District Order*, 27 FCC Rcd 416 (2012), where the Bureau granted an appeal seeking invoice deadline extensions for FY2000 funding requests. From the release of the *Canon-McMillan Order* in 2008 until the release of the *Hancock Order*, we have found not even one case in which the Bureau’s denied an appeal of a Fund Administrator decision to deny an invoice deadline extension request.

⁴ 47 CFR §54.724

⁵ And its predecessor, the Common Carrier Bureau

⁶ E.g., see Order DA 00-704, 15 FCC Rcd 10072 (2000); Order DA 00-809, 15 FCC Rcd 10247 (2000); Order DA 00-841, 15 FCC Rcd 12453 (2000); Order DA 00-1027, 15 FCC Rcd 8133 (2000); Order DA 00-1057, 15 FCC Rcd 18632 (2000); Order DA 00-1187, 15 FCC Rcd 1191 (2000); Order DA 00-1398, 15 FCC Rcd 21800 (2000); Order DA 00-1498, 15 FCC Rcd 22010 (2000); Order DA 00-1622, 15 FCC Rcd 23410 (2000); Order DA 00-1652, 15 FCC Rcd 16833 (2000); Order DA 00-1855, 15 FCC Rcd 15145 (2000); Order DA 00-1974, 15 FCC Rcd 18925 (2000); Order DA 00-1997, 15 FCC Rcd 17133 (2000); Order DA 00-2008, 15 FCC Rcd 17138 (2000); Order DA 00-2009, 15 FCC Rcd 23528 (2000); Order DA 00-2045, 15 FCC Rcd 18289 (2000); Order DA 00-2103, 15 FCC Rcd 17931 (2000); Order DA 00-2258, 15 FCC Rcd 19482 (2000); Order DA 00-2309, 15 FCC Rcd 19681 (2000); Order DA 00-2453, 15 FCC Rcd 21889 (2000); Order DA 00-2454, 15 FCC Rcd 25597 (2000); Order DA 00-2455, 15 FCC Rcd 21894 (2000); Order DA 00-2697, 15 FCC Rcd 23811 (2000); Order DA 00-2698, 15 FCC Rcd 23814 (2000); Order DA 01-21, 16 FCC Rcd 275 (2001); Order DA 01-22, 16 FCC Rcd 281 (2001); Order DA 01-259, 16 FCC Rcd 3929 (2001); Order DA 01-260, 16 FCC Rcd 3931 (2001); Order DA 01-534, 16 FCC Rcd 4817 (2001); Order DA 01-535, 16 FCC Rcd 4820 (2001); Order DA 01-835, 16 FCC Rcd 7620 (2001); Order DA 01-836, 16 FCC Rcd 10274 (2001); Order DA 01-1807, 16 FCC Rcd 14738 (2001); Order DA 01-1882, 16 FCC Rcd 15129 (2001); Order DA 01-1876, 16 FCC Rcd 15109 (2001); Order DA 01-2062, 16 FCC Rcd 16189 (2001); Order DA 01-2064, 16 FCC Rcd 16195 (2001); Order DA 01-2289, 16 FCC Rcd 17708 (2001); Order DA 01-2291, 16 FCC Rcd 17715 (2001); Order DA 01-2702, 16 FCC Rcd 20384 (2001); Order DA 01-2703, 16 FCC Rcd 20387 (2001); Order DA 01-2952, 16 FCC Rcd 22490 (2001);

The Rules also provide that the Commission may extend the time period for taking action of a request for review of an Administrator decision pending before the Wireline Competition Bureau. The Commission has typically granted additional time only in cases where it identified novel or complex issues, and the additional time grant has typically been 30 to 60 days. However, the Commission did not elect to issue such an order with respect to Morton's appeal. Therefore, the deadline by which the Bureau was required to issue a decision on Morton's appeal remained unchanged at 3/11/2013.

On 7/23/2014 the Commission released the *E-Rate Modernization Order*⁷, with an effective date for most provisions set at 30 days after publication in the *Federal Register*. That order provided for far-reaching changes to the E-Rate program, including a policy change for the grant of invoice deadline extensions. The order was published in the *Federal Register* on 8/19/2014. The order's effective date of 9/18/2014 is 756 days after Morton submitted its invoice deadline extension to USAC, 647 days after Morton filed its request for review, and 556 days after the date by which the Bureau was required by Commission Rule to issue a decision.

Order DA 02-139, 17 FCC Rcd 953 (2002); Order DA 02-140, 17 FCC Rcd 957 (2002); Order DA 02-217, 17 FCC Rcd 1716 (2002); Order DA 02-374, 17 FCC Rcd 27416 (2002); Order DA 02-397, 17 FCC Rcd 3188 (2002); Order DA 02-398, 17 FCC Rcd 3193 (2002); Order DA 02-669, 17 FCC Rcd 5248 (2002); Order DA 02-670, 17 FCC Rcd 5250 (2002); Order DA 02-954, 17 FCC Rcd 7376 (2002); Order DA 02-955, 17 FCC Rcd 7381 (2002); Order DA 02-1185, 17 FCC Rcd 8882 (2002); Order DA 02-1536, 17 FCC Rcd 12786 (2002); Order DA 02-1537, 17 FCC Rcd 12792 (2002); Order DA 02-1786, 17 FCC Rcd 14392 (2002); Order DA 02-1788, 17 FCC Rcd 14397 (2002); Order DA 02-1954, 17 FCC Rcd 15690 (2002); Order DA 02-1990, 17 FCC Rcd 16058 (2002); Order DA 02-2050, 17 FCC Rcd 16168 (2002); Order DA 02-2051, 17 FCC Rcd 16174 (2002); Order DA 02-2350, 17 FCC Rcd 17407 (2002); Order DA 02-2351, 17 FCC Rcd 17409 (2002); Order DA 02-2460, 17 FCC Rcd 19101 (2002); Order DA 02-2461, 17 FCC Rcd 19103 (2002); Order DA 02-2828, 17 FCC Rcd 21200 (2002); Order DA 02-2833, 17 FCC Rcd 21212 (2002); Order DA 02-3075, 17 FCC Rcd 22570 (2002); Order DA 02-3076, 17 FCC Rcd 22572 (2002); Order DA 02-3251, 17 FCC Rcd 23819 (2002); Order DA 02-3252, 17 FCC Rcd 23822 (2002); Order DA 03-37, 18 FCC Rcd 78 (2003); Order DA 03-38, 18 FCC Rcd 82 (2003); Order DA 03-241, 18 FCC Rcd 924 (2003); Order DA 03-242, 18 FCC Rcd 926 (2003); Order DA 03-392, 18 FCC Rcd 1770 (2003); Order DA 03-393, 18 FCC Rcd 1773 (2003); Order DA 03-759, 18 FCC Rcd 4509 (2003); Order DA 03-760, 18 FCC Rcd 4512 (2003); Order DA 03-1136, 18 FCC Rcd 7018 (2003); Order DA 03-1137, 18 FCC Rcd 7021 (2003); Order DA 03-1571, 18 FCC Rcd 9699 (2003); Order DA 03-1572, 18 FCC Rcd 9702 (2003); Order DA 03-2054, 18 FCC Rcd 12267 (2003); Order DA 03-2055, 18 FCC Rcd 12271 (2003); Order DA 03-2285, 18 FCC Rcd 14466 (2003); Order DA 03-2287, 18 FCC Rcd 14471 (2003); Order DA 03-2668, 18 FCC Rcd 16540 (2003); Order DA 03-2669, 18 FCC Rcd 16544 (2003); Order DA 03-2977, 18 FCC Rcd 19549 (2003); Order DA 03-2978, 18 FCC Rcd 19554 (2003); Order DA 03-3628, 18 FCC Rcd 23902 (2003); Order DA 03-3629, 18 FCC Rcd 23905 (2003); Order DA 03-3934, 18 FCC Rcd 25841 (2003); Order DA 03-3935, 18 FCC Rcd 25844 (2003); Order DA 04-116, 19 FCC Rcd 1010 (2004); Order DA 04-117, 19 FCC Rcd 1013 (2004); Order DA 04-740, 19 FCC Rcd 5231 (2004); Order DA 04-777, 19 FCC Rcd 5328 (2004); Order DA 04-1840, 19 FCC Rcd 11287 (2004); Order DA 04-1841, 19 FCC Rcd 11291 (2004); Order DA 04-2113, 19 FCC Rcd 13043 (2004); Order DA 04-2114, 19 FCC Rcd 13047 (2004); Order DA 04-2464, 19 FCC Rcd 14862 (2004); Order DA 04-2465, 19 FCC Rcd 14865 (2004); Order DA 04-2528, 19 FCC Rcd 15554 (2004); Order DA 04-2965, 19 FCC Rcd 18068 (2004); Order DA 04-2966, 19 FCC Rcd 18073 (2004); Order DA 04-3160, 20 FCC Rcd 911 (2004); Order DA 04-3161, 20 FCC Rcd 915 (2004); Order DA 04-3680, 19 FCC Rcd 22888 (2004); Order DA 04-3681, 19 FCC Rcd 22893 (2004); Order DA 04-3900, 19 FCC Rcd 24039 (2004); Order DA 04-3901, 19 FCC Rcd 24043 (2004); Order DA 05-32, 20 FCC Rcd 413 (2005); Order DA 05-35, 20 FCC Rcd 424 (2005); Order DA 05-494, 20 FCC Rcd 4093 (2005); Order DA 05-495, 20 FCC Rcd 4095 (2005); and Order DA 05-1067, 20 FCC Rcd 7973 (2005).

⁷ See *E-Rate Modernization Order*, 29 FCC Rcd 8870 (2014), 79 FR 49159 (2014).

On 5/11/2015 the Bureau released the *Hancock Order*⁸, in which it applied the pre-2014 funding year provisions of the *E-Rate Modernization Order* to Morton's 8/23/2012 invoice deadline extension requests and denied Morton's 12/10/2012 appeal.

STANDARDS FOR PETITION FOR RECONSIDERATION

Instant Petition for Reconsideration meets the standards set in the Commission's Rules⁹.

This petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since Morton's 12/10/2012 appeal¹⁰.

Furthermore, the Commission has previously found that, under certain circumstances, rigid adherence to certain E-rate rules and requirements that are "procedural" in nature does not promote the goals of section 254 of the *Telecommunications Act of 1996* – ensuring access to discounted telecommunications and information services to schools and libraries – and therefore does not serve the public interest¹¹. Therefore, it is in the public interest for the Bureau to consider the facts and arguments herein¹².

DISCUSSION: Retroactive application of the *E-Rate Modernization Order's* more stringent standard for invoice deadline extension requests to requests submitted prior to the effective date of the *E-Rate Modernization Order* is impermissible retroactive rulemaking.

Under the Administrative Procedure Act, substantive Commission rules apply prospectively, not retroactively, with limited exceptions not relevant here. Courts have drawn a distinction between agency decisions that "substitut[e]... new law for old law that was reasonably clear," and those that are merely "new applications of existing law, clarifications, and additions¹³". Where substitution occurs, the new law may be given prospective-only effect to "protect the settled

⁸ *Hancock et al. Order*, DA 15-570 released 5/11/2015

⁹ 47 CFR §1.106

¹⁰ 47 CFR §1.106(c)(1)

¹¹ See *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School*, 21 FCC Rcd 5316 (2006).

¹² 47 CFR §1.106(c)(2)

¹³ *AT&T Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

expectations of those who had relied on the preexisting rule”¹⁴. In other words, a decision that “attaches new legal consequences to events completed before its enactment”, such as increasing a party’s liability for past conduct, creating a new obligation, or imposing a new duty with respect to transactions already completed, is a substitution of an old law and may only be applied prospectively¹⁵. An agency decision therefore cannot be applied retroactively if it “alter[s] the past legal consequences of past actions”, and federal agencies are prohibited from enacting retroactive “rules” (whether codified as rules or whether issued as orders) without explicit congressional authorization to do so.¹⁶

In *Canon-McMillan* the Bureau found in its review of 20 appeals seeking review of Administrator decisions that invoice deadline extension requests denied by USAC should be granted. The Bureau recognized that filing deadlines are necessary for the efficient administration of the E-Rate program; but the Bureau also found that when an invoice deadline is missed, a requested deadline extension should be granted. When applicants who were denied invoice deadline extensions by USAC (as a consequence of USAC’s invoice deadline extension policies) appealed USAC’s denials to the Bureau, the Bureau overruled USAC’s policies and extended the invoicing deadlines.

Although the Bureau stated in *Canon-McMillan* that it based its findings “on the facts and circumstances of these specific cases”, the fact is that in *Canon-McMillan* and five subsequent orders¹⁷ dealing with the same issue the Bureau granted 102 appeals of invoice deadline extension requests denied by USAC, and the Bureau *denied precisely zero appeals*. The “facts and circumstances” cited in *Canon-McMillan* included a wide scope of reasons for which an applicant missed the invoice deadline, and the Bureau deemed that in each of these cases the applicant should be permitted to submit an invoice after USAC’s procedural deadline.

It is reasonable to assume that no E-Rate applicant sets out to deliberately miss USAC’s procedural invoicing deadline. On the other hand, *Canon-McMillan* and subsequent Bureau orders clearly established and put E-Rate applicants on notice – with a 102 to 0 record – that the expected consequence in the case of a

¹⁴ *Verizon Tel. Cos.* at 1109 (citing *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)). Note that in this context the meaning of the words “rule” and “rulemaking” extend beyond the limited meaning of “a directive which ultimately is codified in the *Code of Federal Regulations*”.

¹⁵ *National Min. Ass’n v. Department of Labor*, 292 F.3d 849, 859-60 (D.C. Cir. 2002).

¹⁶ *Bowen v. Georgetown*, 488 U.S. 204, 221-25 (1988) (Scalia, J., concurring) (“Adjudication deals with what the law was; rulemaking deals with what the law will be.”) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947)).

¹⁷ *Alton Community Unit*, 25 FCC Rcd 7089 (2010); *ABC Unified School District*, 26 FCC Rcd 11019 (2011); *Franklin County School District*, 26 FCC Rcd 14251 (2011); *Clintonville Public School District*, 27 FCC Rcd 416 (2012); and *Annunciation Elementary School*, 27 FCC Rcd 7007 (2012).

missed USAC's procedural invoicing deadline would be the effort of requesting an invoice deadline extension from USAC (and possibly the effort to appeal an adverse decision to the Bureau should USAC choose to disregard, in a particular case, the Bureau's findings in *Canon-McMillan*). Therefore, as administrators attempted to manage the myriad responsibilities that are required to operate a school district or library system, they allocated resources for the management of the invoicing deadline based on the expectation that a missed invoicing deadline might lead to inconvenience or delay, *but would not ultimately lead to denied funding*.

An interpretation by the Bureau of the *E-Rate Modernization Order* which deems the more stringent standard for granting pre-2014 funding year invoice deadline extension requests should be applied retroactively to requests filed years before the effective date of the *E-Rate Modernization Order* is in error, as application of a new rule which affects the past legal consequences of a past action – the failure to file an invoice by USAC's procedural due date – is impermissible. In fact, as recently as March of this year the Commission itself acknowledged that changes to its rules and procedures “appropriately apply only on a prospective basis”¹⁸.

For the reasons stated, the more stringent standard for invoice deadline extension grants for pre-2014 funding years should only be applied prospectively to invoice deadline extension requests submitted on or after the effective date of the *E-Rate Modernization Order*; therefore, the Bureau should reconsider its earlier decision and issue a correcting order.

DISCUSSION: The Commission did not intend for the Bureau to apply the more stringent pre-2014 funding year invoice deadline extension standards to deadline extension requests filed prior to the effective date of the *E-Rate Modernization Order*.

The *E-Rate Modernization Order* explicitly states that it is effective “thirty (30) days after the publication of this Report and Order and Further Notice of Proposed Rulemaking in the Federal Register”; that language encompasses all provisions of the order.

Since (as explained above) the Commission cannot change the law on what has already passed, the plain meaning of the effective date is that the pre-2014 funding year invoicing (and invoice deadline extension) guidance applies to invoice deadline extension requests submitted on or after the effective date; it cannot mean that as of the effective date the past consequences of past actions

¹⁸ See *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, n. 792 (Mar. 12, 2015) (citing *Verizon v. FCC*, 269 F.3d 109 (D.C. Cir. 2001)).

are somehow transformed. Therefore, in the *Hancock Order* the Bureau erred in applying the new invoice deadline extension standard to requests submitted to USAC prior to the effective date of the *E-Rate Modernization Order*, and the Bureau should reconsider its earlier decision and issue a correcting order.

DISCUSSION: Adverse consequences for Morton should not come as the direct result of the Bureau's non-compliance with the Commission's Rules setting time limits for Bureau action.

One important question in the resolution of this matter is the proper determination and application of the effective date of the pre-2014 invoice deadline extension request guidelines in the *E-Rate Modernization Order*; for the reasons we noted above, the application of those guidelines in the *Hancock Order* to invoice deadline requests submitted prior to the *E-Rate Modernization Order's* effective date is in error. However, there is another important deadline issue germane to the proper adjudication of Morton's appeal which should have been addressed in the *Hancock Order*, but was not.

The Commission's Rules¹⁹ provide that the Bureau shall, within 90 days, take action in response to a request for review of an Administrator decision that is properly before it (with some provisions for extending the review period that are not relevant here, since the conditions for extending the review period were not met). The Rule was established in essentially its current form in the *Changes to the Board of Directors of the National Exchange Carriers Association, Inc Order*²⁰ published in the *Federal Register* on 5/30/2000. Since the order was deemed to be "exempt from the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553, because it affects only rules of agency procedure or practice", the effective date of the Rule was stated to be the *Federal Register* publication date – 5/30/2000.

The application of the provisions of §54.724 to Morton's 12/10/2012 appeal produces a date of 3/11/2013 by which the Bureau was required to have adjudicated the appeal. However, the Bureau released the *Hancock Order* on 5/11/2015 – an especially egregious violation of the Commission's Rules in which the Bureau was delinquent by 791 days. Had the Bureau complied with the Commission's Rules and adjudicated Morton's appeal on a timely basis, there

¹⁹ 47 CFR §54.724

²⁰ *Changes to the Board of Directors Of the National Exchange Carriers Association, Inc Order*, 15 FCC Rcd 9336 (2000), 65 FR 34407 (2000). The Rule was later amended only to the extent of changing "Common Carrier Bureau" to "Wireline Competition Bureau" in *Order FCC 02-10*, 17 FCC Rcd 4672 (2002), 67 FR 13215 (2002), with an effective date of 3/25/2002.

would have been no question about the applicability of the Bureau's long-standing policy and precedent regarding invoice deadline extensions.²¹

In any event Morton should not be held accountable for the consequences of the Bureau's own failure to comply with an adjudication due date lying *more than two years* prior to the release of the *E-Rate Modernization Order*. Therefore, the Bureau should reconsider its earlier decision and issue a correcting order.

REQUESTED RELIEF

For the reasons stated in this Petition for Reconsideration Morton prays that the Bureau will reconsider its decision in the *Hancock Order* and grant the invoice deadline extensions Morton sought in its 8/23/2012 invoice deadline extension requests submitted to USAC.

J. STERLING MORTON HIGH SCHOOL DISTRICT 201

Robert Niedermeyer

by Robert Niedermeyer
IT Director

June 10, 2015

²¹ E.g., the Bureau had again confirmed its policy in the release of the *Annunciation Elementary School Order* on 6/18/2012.